

**FRIENDS OF THE
BABCOCK-MACOMB HOUSE**

1317 G STREET, NW
WASHINGTON, DC 20005

October 15, 2007

BY FACSIMILE (202-727-6072) AND EMAIL

Clifford W. Moy
Secretary, Board of Zoning Adjustment
441 4th Street, NW, #200-210 South
Washington, DC 20001

Re: BZA Appeal #17663 – Response to Motion to Dismiss

Dear Mr. Moy:

Attached is the response of the Friends of the Babcock Macomb House to the Motion to Dismiss filed by SGI.

I am providing simultaneously, by email, a copy of this submission to DCRA and to SGI's counsel, Alison Prince.

Respectfully submitted,



John R. Magnus

Attachment

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17663

EXHIBIT NO. 22

Board of Zoning Adjustment
District of Columbia
CASE NO. 17663
EXHIBIT NO. 22

RECEIVED
D.C. OFFICE OF ZONING
OCT 15 PM 4:21

RECIPIENT	COMPANY	PHONE NO.	FAX NO.
Clifford W. Moy	Friends of the Babcock-Macomb House		202.727.6072

FROM: John R. Magnus

PHONE:

DATE: October 15, 2007

TRANSMITTAL CONSISTS OF THIS COVER PAGE, PLUS PAGE(S)

COMMENTS

— 29 pages
total

M&C FAX ROOM:

Please return this fax to the desk of JOHN MAGNUS after transmittal.

Time Sent

Time Confirmed

Operator

CONFIDENTIALITY NOTE

This facsimile message contains a confidential communication subject to protection under the attorney-client privilege and/or the attorney work-product doctrine. The message is intended solely for the use of the individual or entity to whom it is addressed and should not be read by anyone other than the intended recipient. In the event of a transmission error, please notify us immediately by collect telephone call at the number shown below. Thank you.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Friends of the Babcock-Macomb House	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 17663
	)	
Department of Consumer and	)	
Regulatory Affairs,	)	
	)	
Appellee.	)	

Opposition to SGI's Motion to Dismiss**I. Background**

According to its website, Soka Gakkai International-USA ("SGI") is an American Buddhist association that promotes world peace and individual happiness based on the teachings of the Nichiren school of Mahayana Buddhism.¹ SGI operates approximately 90 assembly halls throughout the United States, Guam, Puerto Rico, and Trinidad & Tobago. SGI refers to these centers with different, seemingly interchangeable terms: community centers, cultural centers, and activity centers.² None of the centers are ever referred to as "churches" or "worship centers."

Speaking before neighbors of the 3417 Massachusetts Avenue site on December 16, 2004, SGI's public affairs director initially represented that the building at issue was to be a community center to be used for a variety of purposes, principally other than worship, and that the specifically-identified sanctuary space would be the "least used" space in the building. When SGI was informed that the center would require special

¹ <http://www.sgi-usa.org/>

² In New York, for example, there is the "Hudson Valley Activity Center," the "New York Culture Center," and the "Queens Community Center."

zoning relief to be built in an R-1 zone unless it was a "church or other place of worship," SGI re-labeled its plans to refer to the building as a "church,"³ despite the fact that, according to publicly available information, none of the group's other assembly halls are referred to as churches.

SGI's characterization of its plans was the basis on which it sought to take advantage of a special zoning category available only to "churches and places of worship."⁴ Under this exemption, which does not apply to all facilities constructed for religious purposes, an assembly hall where the primary reason for assembling is to engage in "worship" may be built as a matter of right in an area zoned R-1. The DC Zoning Administrator ("ZA") accepted SGI's representations that the primary use of the proposed assembly hall would be for worship, and DCRA therefore granted SGI, without requiring additional zoning relief, the permits required to construct the hall.

The Friends of the Babcock Macomb House ("Friends" or "FBM") is a group of citizens residing near SGI's proposed building. Based on information indicating that the primary use of the center would not be for worship, and on reports from SGI and from legitimate news sources that SGI had no churches and that its lay members engaged in no worship except ritual chanting before a scroll, FBM appealed the ZA's decision that this was a matter-of-right project. FBM is proceeding *pro se* before the Board. The appeal was timely filed on May 1, 2007 and accepted by the BZA for review. Less than a week before the scheduled hearing, FBM received a 19-page Motion to Dismiss filed by SGI. BZA rules do not provide a time period for response to such motions. The Board

³ See, e.g., exhibit 6 ("The land will be used by SGI-USA to construct a church, which it refers to as a "culture center," whose primary purpose is to serve the religious needs of the members of its [sic] Washington DC Area").

⁴ 11 DCMR § 201.1(b).

determined at the first day of the hearing that FBM would be allowed until October 15, 2007 to file this response to SGI's motion.

II. Introduction and Summary

The law in DC is clear. In a residential neighborhood, a place of assembly may be built as a matter of right only if the primary use of the building -- the primary reason for assembling in the building -- is worship. Information on the allocation of space and the intensity of various proposed uses is relevant to determining what the primary use, and thus the fundamental character of the proposed building, is. Once a building whose primary use is worship is erected, it can be used thereafter for other religious activities that do not entail worship, such as community activism, sales of books, or education. Conversely, if the primary use of a building is not for worship but for other religious activities, it may not be built in a residential neighborhood as a matter of right. Hence, for example, a church school, bookstore, meeting room, office or soup kitchen cannot be built independent of a place of worship as a matter of right, but if they are ancillary to a building whose primary use is worship, they may be included or added subsequently as a matter of right.

The law is also clear that regulators, not applicants, decide whether the matter of right privilege applies to a given building or permit application. This means that the ZA and BZA, not the applicant, must determine whether the primary use of the proposed building here is for worship or for other religious (or secular) activities. It also means that the regulators must determine what constitutes worship and what does not.

The requirements of the statute are well-adapted to mediate the tensions between the District's tripartite interest in 1) maintaining certain types of neighborhoods, 2) not

substantially burdening the practice of religion, and 3) not unduly favoring religion over secular activities. D.C. has, in effect, determined that it will protect residential neighborhoods by permitting worship in those neighborhoods as a matter of right. However, the state will not permit, in the absence of a predominant use for worship, the erection of assembly halls where the religious activities are objectively indistinguishable from secular activities.

In this case the building proposed by SGI started out as a "community center," morphed into a "church" for the purpose of permit applications and advocacy before the ZA's office, and is now labeled, according to the most recent pleadings and a large sign on the site, a "culture center." While SGI's shifting terminology demonstrates a certain flexibility of mind, what applicants choose to call a building is indicative but not determinative of the uses to which a building will ultimately be put. What matters is the primary use, and that use must be determined by an examination of the actual intended activity, and not merely its labels.⁵

FBM alleges that the ZA erred – both legally, by applying an impermissible interpretation of the statutory terms "church or other place of worship," and factually, by reaching a conclusion wholly without support in the evidentiary record before him – in determining that the primary use of SGI's proposed building is worship. FBM further alleges that the ZA relied on misleading information about the allocation of and intensity of use of space within the building and unlawfully conflated (in his "primary use"

⁵ SGI's desire to call the building a church in order to avoid an inquiry into its uses "brings to mind the observation, attributed to Abraham Lincoln, that calling a dog's tail a leg will not thereby cause the dog to have five legs as the dog's tail remains a tail and not a dog's leg no matter what it is called." *U.S. v. Parker*, 165 F. Supp. 2d 431, 450 (W.D.N.Y. 2001). SGI can no more claim their building is a church "by referring to it as such than could calling the dog's tail a leg in Lincoln's aphorism change the number of legs on the dog." *Id.*

analysis") worship with other religious activity. Those allegations are based on the facts that were before the ZA when he made his decision and, on their face, meet the only requirement that the DC code imposes on a party appealing from a decision by the ZA.⁶

SGI asserts two bases for its Motion to Dismiss. First, SGI argues that FBM needed to allege something more, but SGI does not say what, exactly, FBM must allege. Instead, SGI simply asserts that FBM has not alleged any facts to support its allegation. This is a ridiculous assertion. FBM has alleged that the ZA applied the wrong law to the wrong facts when he made his decision, and that the ZA did not even consider highly-relevant facts of which he had been made aware. Those are the very facts that informed, or should have informed, the ZA's decision. If those facts are not a sufficient basis on which to mount an appeal, then they were not sufficient to support the ZA's determination, and this Board must reverse that determination for lack of a sufficient basis.

Second, SGI makes the equally frivolous, but far more important, contention that the appeal must be dismissed because the ZA was confused about the law. SGI argues that only SGI, and not the ZA, had the right to decide which of SGI's activities constitute worship and what would be the primary use of the building. Thus, according to SGI's logic, there can be no appeal because the law did not permit the ZA to make a decision that would have been contrary to SGI's position. Instead, according to SGI, the ZA was required to accept SGI's characterization of the primary use of the building because any religious use is worship and the primary use of the building was for a religious purpose.

⁶ See D.C. Code § 6-641.07(g) (the Board is empowered to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by...any...administrative officer or body in the carrying out or enforcement of any [zoning] regulation").

Fortunately, this radical proposition has no basis in law. Nothing in the case law or statutes cited by SGI supports this proposition. And several of the cases cited by SGI, as well as several not cited by SGI, make clear that the law is just the opposite: all religious activity is not worship, and it falls on the ZA, not the applicant, to decide both (1) what activity can be considered worship and what can be considered other religious expression, and (2) whether worship is the primary use of the proposed facility here.

Here the ZA purported to make both those decisions, and FBM alleges that he erred with respect to both. Accordingly, the appeal meets the requirements of the statute, and the motion to dismiss must be denied. FBM is entitled to a determination from this Board as to whether worship or other non-worship uses -- religious activities, secular activities, or some combination of both -- are to be the primary use of the building. We address these points below, as well as the rest of SGI's hodgepodge of assertions based on various sources of constitutional, statutory, and judicial law, none of which support SGI's motion and none of which should dissuade this Board from doing its job.

Two other points, however, are worth mentioning at the outset. First, the interpretation of § 201.1(b) urged by SGI poses a serious threat to the continuation of any matter-of-right category for places of worship. Ever since SGI was informed that a community center could not be built on this site as a matter of right, and faced with the fact that its doctrines and public pronouncements either eschew worship or relegate it to the far periphery of its "culture center" activities, SGI has sought to get around the risk that most uses of this particular facility might not fit within the meaning of "worship." It has sought to do so by conflating any and all religiously-motivated activity with worship. It thus argues that if the primary use of the building is for any form of religious activity, it

is entitled to construct the building as a matter of right. This approach would require the ZA or the BZA to read "place of worship" out of the statute in favor of "place of religious activity." More important, if adopted by the BZA, this very short-term and opportunistic view, which might be good for SGI in this circumstance, would pose a real threat to freedom of worship.

What is the nature of this threat? There is a legitimate question whether granting the right to build an assembly hall for religious purposes other than worship, but denying that right for other like but non-religious pursuits, such as education, selling books, making music, meditation, and organizing in support of peace, culture, or education, is consistent with the Establishment Clause of the Constitution.⁷ The law can make special provision for worship, which is distinct from all secular activity.⁸ But the more religious activity is indistinguishable from secular activity, the harder it is for the law to give that religious activity a special preference.⁹ The reading advocated by SGI could lead to the elimination of matter-of-right construction for actual places of worship.

FBM does not advocate such an outcome. Its members welcome places of worship in their neighborhood, and if SGI had proposed a facility whose primary use was worship, FBM (however concerned about neighborhood impacts such as parking) would not have contested the application either below or on appeal here. But FBM is concerned that SGI's attempt to eradicate the difference between worship and other activity that might be pursued religiously (in the broadest sense of that word) could lead to either a

⁷ See, e.g. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 n.1 (1989) ("The Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community").

⁸ *Bronx Household of Faith v. Board of Educ. of City of New York*, 492 F.3d 89, 103 (2d Cir. 2007) (holding that "worship is not simply another standpoint on a secular subject" and that "worship... is a uniquely religious activity for which there is no 'secular analog'").

⁹ *Texas Monthly*, 489 U.S. 1 (1989) (holding that tax exemption for publishing religiously-inspired magazines violates Establishment Clause when exemption not extended to all magazines).

legal determination or a political revolt that would eliminate any matter of right privilege for true places of worship.

Second, FBM deplores SGI's entirely unfounded, but oft-repeated, *ad hominem* assertions regarding FBM's motivation in filing this appeal. There is no concern on FBM's part about religion, Buddhism, or SGI. FBM merely wants regulators to enforce the law that requires special zoning relief in order to place an assembly hall, not dedicated primarily to worship, in a residential neighborhood.

III. FBM's Allegations of Error Meet the Requirements of D.C. Code § 6-641.07(g), and SGI Has Cited No Legal Authority Supporting Dismissal

FBM alleges that the ZA erred in his determination that the building would be used primarily for worship because he relied on misleading information (including bogus calculations) provided by SGI about the allocation and intensity of use of space within the building and ignored voluminous information that contradicted SGI's assertions. Further, FBM alleges that the ZA erred by conflating worship with other religious activity. FBM was aggrieved because the ZA failed to properly apply the facts before him to the zoning regulation that allows an "of right" exception only for churches and places of worship.

FBM's allegations are based on the facts that were before the ZA when he made his decision. On their face, these allegations meet the only requirement that the DC code imposes on a party appealing from a decision by the ZA.¹⁰ FBM has challenged three

¹⁰ See DC ST § 6-641.07(g) (the Board is empowered to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by...any...administrative officer or body in the carrying out or enforcement of any [zoning] regulation").

specific administrative decisions,¹¹ and has provided evidence supporting its contention that each decision was erroneous.¹² Accordingly, it has met its burden of pleading and is entitled to a full hearing by BZA, including cross-examination of DCRA witnesses, and a decision from BZA on the merits.

Despite the clear factual and legal allegations made by FBM, SGI's motion to dismiss asserts FBM failed to state a claim of zoning error.¹³ SGI does not cite to any portion of the record or any portion of FBM's statement of appeal. Instead, SGI cites three cases for the proposition that the BZA "regularly dismisses appeals when the appellant fails to state a claim of zoning error."¹⁴ Each case is distinguishable from the facts of this case, and none of the three supports granting the instant motion to dismiss.

SGI relies primarily on *Appeal No. 11018 of Dupont Circle Citizens Association*, Jan. 12, 1972. Unfortunately, SGI is forced to mischaracterize the holding of that case in order to use it to support SGI's position. SGI repeatedly claims that the Board "dismissed" the *Dupont Circle* appeal because it "was devoid of specific factual allegations."¹⁵ Contrary to SGI's assertion, the BZA declined the appellee's request to dismiss the appeal, accepted jurisdiction, and issued a ruling on the merits. While the Board did find appellants in the *Dupont Circle* appeal failed to present any facts that members of the Association were harmed by the ZA's decision, it reached that decision

¹¹ See Statement Supporting Appeal of the Approval of Construction Permits, and Related Rulings, at 3417 Massachusetts Ave., NW, Square 1939, Lot #42 (hereinafter "Appeal Statement") at 1 (listing the three decisions challenged by FBM as 1) the March 2, 2007 ruling by the ZA that the proposed building qualifies as a "church or other place of worship," 2) the April 10, 2007 approval by DCRA of application #5263-A-6; and 3) the November 30, 2006 and December 11, 2006 issuance of construction permits).

¹² Appeal Statement at 1-3 and attached exhibits.

¹³ As discussed below, the Constitutional and federal statutory arguments raised by SGI are wrong, irrelevant for purposes of a motion to dismiss, or both.

¹⁴ Motion to Dismiss at 10.

¹⁵ See Motion to Dismiss at 10.

only after considering the merits of the parties' positions. As the BZA did in *Dupont Circle*, the Board should here should complete its review and issue a ruling on the merits.

The two other BZA decisions cited by SGI are similarly unpersuasive. In *Appeal No. 17391 of Diana de Brito and Jonathan Gottlieb*, Jan. 10, 2006, the Board dismissed an appeal because the appellants argued not that a permit was impermissibly granted, but that the structure as built violated the terms of the permit. Because that was a dispute unrelated to the actual issuance of the permit, the appellant failed to state a claim of zoning error. Similarly, in *Appeal No. 13917 of Advisory Neighborhood Commission 2A*, Feb. 16, 1983, the Board dismissed an appeal where the appellant alleged that adding a door to an apartment building would convert the structure into a hotel. The Board held that a door, installed in an apartment building, leading to a yard, which led to a hotel, does not change the use of either building or constitute an expansion of the hotel.

The facts of *de Brito* and *ANC 2A* are readily distinguishable. Unlike in *de Brito*, FBM is not arguing that SGI violated the terms of a validly issued permit, but that the permit itself was not validly issued. In making his March 2, 2007 decision, the ZA relied on unreliable and self-serving statements and failed to consider highly relevant evidence. Unlike in *ANC 2A*, the facts are not one-sided regarding the proposed use of the building. FBM validly raised concerns and presented substantial, reliable evidence to the ZA. The ZA completely ignored that contrary evidence in making his decision.

Finally, SGI alleges FBM has missed the statutory 60-day deadline with regard to the sheeting and shoring permits. Section 3112.2(a) of the DC Municipal Regulations allows a party 60 days from the date the party appealing the decision had notice or knowledge of the decision complained of. So, SGI would have a point if FBM were

appealing the fact that the sheeting and shoring permit was issued in advance of the ZA's determination that SGI could build as a matter of right. However, premature approval is not the sole basis of FBM's appeal. FBM is contesting the ultimate legality of issuing a sheeting and shoring permit for a building that cannot be built. FBM did not have notice that the principal permits that are the implicit predicate of a lawful sheeting and shoring permit would be issued on a matter of right basis, and therefore in violation of §201.1(b), until the ZA issued his decision on March 2, 2007. FBM timely filed this appeal on May 1, 2007 within the 60 day deadline. Any other approach would have been quite disorderly from an appellate review perspective and disrespectful of the need for efficiency in BZA proceedings.

Because FBM has met its burden of pleading under the DC Code, and because SGI has failed to cite any legal authority providing a valid basis for dismissing this appeal, the Board should deny SGI's motion and rule on the merits of the appeal.

IV. FBM Has Made Allegations Which, if Sustained, Would Allow it to Prevail on the Merits

Contrary to SGI's claim that FBM has failed to allege a zoning error, FBM has clearly alleged that the ZA reached the wrong decision when considering whether SGI's application fell within a special category in the zoning regulations. Further, FBM has alleged that the evidence is clear that the ZA made an incorrect decision, and the primary purpose of SGI's assembly hall is not as a church or place of worship. Therefore, FBM asserts that the decision of the ZA should be reversed, and the BZA should find that SGI's building is not a church or place of worship, and therefore cannot be located in an R-1 district as a matter of right.

A. The Only Issue Before the ZA Was Whether SGI's Building Qualified as a Church or Place of Worship

In DC neighborhoods zoned for R-1 uses, a limited number of special exemptions exist for buildings other than single-family residences.¹⁶ One of these special exemptions is for a "church or other place of worship."¹⁷ The only issue before the ZA, and now before the BZA, is whether the proposed use of SGI's building entitles it to "matter of right" status. If the building qualifies as a "church or other place of worship," then it may be built "of right" in an R-1 district. If regulators determine that the proposed building is not "primarily" a place of worship and therefore is not entitled to "matter of right" status under 11 DCMR § 201.1(b), SGI would have to change its intended use or apply for a special exception under 11 DCMR § 3102.

B. "Worship" in this Context is Not Co-Extensive With Religious Activity

The § 201.1(b) exception applies only to "churches or other places of worship." It does not apply to buildings that may be used for religious exercise generally, but only to buildings whose predominant use is for the particular form of religious exercise called worship. While worship is a form of religious expression, not all forms of religious exercise are worship.¹⁸

SGI, like the ZA, confuses this issue when it states that the proposed building "is the only location in the District where SGI members will be able to meet and practice their religious beliefs."¹⁹ First, if SGI is here asserting that a substantial burden on its practice will result if it is required to make worship the primary use of its culture center

¹⁶ See 11 DCMR §§ 201.1(a)-(s).

¹⁷ *Id.* at § 201.1(b).

¹⁸ See *Bronx Household of Faith*, , 492 F.3d at 103.

¹⁹ Motion to Dismiss at 12.

in order to build as a matter of right, it bears the burden of proof²⁰ and has offered no such proof before the ZA or otherwise. To the contrary, it is implausible that an organization as well-funded as SGI can only find a place for its members "to practice their religious beliefs" on one of the most expensive plots of residential land in D.C. Second, the question here is not whether SGI adherents are entitled to practice their religion, but whether SGI has complied with the zoning laws in order to be able to build a particular facility at 3417 Massachusetts Ave. SGI has no right to build a place of assembly there merely to enable members to practice their beliefs. At that address, a building where adherents can practice their religious beliefs is entitled to a special exemption under § 201.1(b) *only* if the primary use of that building is for worship.

Worship is not defined in either the D.C. Code or regulations. Section 199.2(g) of the zoning regulations directs one to the definition given in Webster's Unabridged Dictionary, where the term "worship" is defined as:

The act of paying divine honors to the Supreme Being; religious reverence and homage; adoration, or acts of reverence, paid to God, or a being viewed as God...To pay divine honors to; to reverence with supreme respect and veneration; to perform religious exercises in honor of; to adore; to venerate...To perform acts of homage or adoration; esp., to perform religious service.²¹

Although the practice of most religions entails the act of worship, not all buildings owned by religious organizations are places of worship. Certainly, SGI's association with Buddhism does not suffice to establish that a building owned or built by SGI is a place of worship. SGI describes itself as a "lay" organization -- but even if, for argument's sake, it were a purely religiously-oriented organization, that would not create

²⁰ *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

²¹ SGI's citation, in its Statement in Opposition to Appeal, to the Merriam-Webster Dictionary is not supported by the DC Municipal Regulations. It is the Webster's Unabridged Dictionary that controls.

a presumption that its assembly halls are churches or places of worship. And indeed, SGI is quite adamant about its character as a "lay" group that does not own or operate churches. As summarized in a 2002 *Washington Post* article:²²

As a *lay* organization, Soka Gakkai has no priests, lamas or other holy figures. Practitioners consider themselves more humanistic than ritualistic, emphasizing the overall goodness of humanity and the responsibility of the individual to act morally and ethically. Monthly meetings are held in community centers rather than temples and consist of lectures and discussions, not worship.²³

While SGI may argue that its activities at the proposed culture center would promote aspects of Buddhism, courts have rejected such a broad definition of a "church" or "place of worship." The Court of Appeals of Washington addressed this issue in *N. Pac. Union Conference Ass'n of the Seventh Day-Adventists v. Clark County*, 74 P.3d 140, 144 (Wash. Ct. App. 2003). In Washington state, a church is defined as a "building primarily used for religious worship." Like Section 201(b), the applicable zoning codes in this case did not define "religious worship." Accordingly, both the zoning officer and the court referred to a dictionary definition, defining a church as a place where "an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual" occurs. *Id.* at 144. On appeal, Adventists asserted that the hearing officer "too narrowly interpreted a place of worship to be only a traditional church with a local congregation," maintaining that "worship must be broadly defined to include missionary work, education, charitable giving, communication, publication, and planning and growth activities" because they were "a vital part of the Church's worship program." *Id.* at 143-144. The court was not persuaded by the Church's proposed

²² Bill Broadway, *Soka Gakkai International*, *Washington Post*, Mar. 23, 2002, at B11 (attached to FBR's Appeal Statement at Exhibit 4).

²³ This article is listed approvingly on SGI-USA's website. See, <http://www.sgi-usa.org/buddhism/resourceguide/resourceguide.html>.

definition of worship, which included any activity that furthers a worship program, as this would allow a religious organization to run any type of business and claim it advanced the purpose of the religious group. *Id.* at 145.

Other courts have noted that even if a building is dedicated to performing religious services, those services or religious rites do not necessarily mean that a building is a "place of worship." The Superior Court of New Jersey found that the fact that a particular building was "devoted to the performance of certain religious rites by females did not make it a building set apart for public worship, as a church, in the common understanding of the meaning of that word." *Sexton v. Bates*, 85 A2d 833, 337-38 (N.J. Super. L. 1951). In the case of *B'Nai B'Rith Found. v. Walworth County Bd. of Adjustment*, the Supreme Court of Wisconsin found that an applicant's conference center, "which was to include programs for adults in current topics of interest to members of B'Nai B'Rith, primarily religious and educational" with "primary emphasis being placed on subjects involving the Jewish faith," did not meet the necessary zoning requirements to be considered a church. *B'Nai B'Rith Found. v. Walworth County Board of Adjustment*, 208 N.W.2d 113 (Wis. 1973).

If a building whose primary purpose was religious education could not meet the necessary zoning requirements, there is a real issue as to whether SGI's proposed building meets those requirements.²⁴ Certainly, an organization's association with a particular religion, even if a building is dedicated entirely towards the practice or

²⁴ While SGI may claim that its educational and cultural programs incorporate Buddhist principles, they certainly focus on secular subjects. See <http://www.sgide.com/index.html> (upcoming events scheduled for SGI's Washington, DC chapter include a world peace talent show, a Korean General meeting, and a family camp).

promotion of that religion,²⁵ does not mean that it is a church or place of worship for the purposes of zoning codes.

C. The ZA Was Required to Decide Whether Worship Is To Be the Primary Use of SGI's Building and Erroneously Ruled That It Was

In the past, the ZA, and ultimately the BZA and the reviewing courts, have looked at both the expected use and the amount of space devoted to a particular use, the intended purpose of an organization's programs, and the income derived from various uses in order to determine what use is a facility's principal use and what use is accessory. *See, e.g., Ass'n for the Preservation of 1700 Block of N Street, N.W. and Vicinity, et al. v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 668, 673-74 (C.A.D.C. 1978). *See also, Nat'l Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984 (D.C. 2000).

In determining the principal use of a building, many courts stress an analysis of the amount of space devoted to the particular use. *See Ass'n for the Preservation of N Street* at 672; *Philm Corp. v. Washington Twp*, 638 A.2d 388, 390 (Pa. Commw. Ct. 1994); *Franchi v. Zoning Hearing Bd. of the Borough of New Brighton*, 543 A.2d 239, 240-41 (Pa. Commw. Ct. 1988). If the space devoted to a particular use accounts for the majority of the building, courts find that use to be the principal use. *See Philm*, 638 A.2d at 390 (determining that a building was not a restaurant/tavern where the space was designed with a focus on entertainment); *Franchi*, 543 A.2d at 240-41 (holding that the

²⁵ *See also, Brenna v. Board of Zoning Appeals of Evansville and Vanderburgh County*, 695 N.E.2d 983 (Ind. Ct. App. 1998). The court ruled that although a philanthropic organization running a shelter received much of its support from local churches, shelter users were not required to attend church or pay in order to utilize organization's services, and no church services were planned to be conducted at shelter.

building was not primarily a residence where the vast majority of the building was committed to the owner's accounting practice and only a small portion to living quarters).

The same standard of "principal use" applies to churches and other places of worship. For example, in the case of *N. Pac. Union Conference*, the court, observing that only 2,400 square feet of the 40,000 square foot building was to be devoted to worship, found that the primary use of the building was administrative or managerial. *N. Pac. Union*, 74 P.3d at 144.

Thus, contrary to the argument in SGI's motion to dismiss, the ZA was required to determine the principal use of the building. The ZA properly undertook to make this determination but made both legal and factual errors when he did so.

D. FBM is Entitled to Challenge Whether the ZA Properly Determined that the Primary Use of the Proposed SGI Culture Center Was Worship.

The questions raised by FBM are thus valid questions of law and fact. Even assuming for argument's sake that some worship will in fact take place in the proposed building, FBM has raised many legitimate issues, including: whether the ZA properly distinguished worship from other religious (as well as from secular) activity; whether there was sufficient evidence to support the ZA's determination that the primary use of the building would be for worship; whether SGI has shown that its activities were worship or merely conflated worship with "other religious activity"; whether SGI has shown that its proposed "sanctuaries" are intended for worship or for mixed use; and whether, overall, worship will be the primary use of the building.

Each of these issues arises from what SGI itself or legitimate public sources of information have said about SGI practices. For example, with respect to the question of

whether the ZA properly found that the proposed culture center would be used primarily for worship, there is a real issue whether the “chanting rooms” and “sanctuaries” are intended for worship (and, if so, whether that worship will be the primary use of those rooms or the building). Discussing its Buddhist associations, SGI articulates the basic elements of the practice of Nichiren Buddhism, and notes that its members “carry out their daily practice *at home*.”²⁶ This practice consists of the chanting of *Nam-myoho-renge-kyo*, ideally each morning and evening, and *gongyo*, which consists of the recital of chapters of the Lotus Sutra in front of the *Gohonzon*. However, “SGI members chant *Nam-myoho-renge-kyo* to a *Gohonzon* enshrined in their own homes.”²⁷

These SGI statements raise a real question, presented to but not addressed by the ZA, of why, if its doctrine prescribes that this activity takes place primarily in the home, SGI would build a culture center to replicate that function, and, more important, whether that practice, if it qualifies as worship, will be the primary use of the rooms or the building. SGI is obviously uncertain about this issue because it asserts that the spaces will also be used for regular discussion meetings. However, such meetings cannot be considered worship (unless of course one improperly conflates “worship” with “religious activity”). See, *B’Nai B’Rith Foundation*, 208 N.W.2d 113.

The issues raised by FBM go to the heart of the decisions made by the ZA and are grounded in the law and the facts. FBM has every right to have them heard and decided on the merits.

²⁶ <http://www.sgi.org/english/Buddhism/practice.htm>

²⁷ <http://www.sgi.org/english/Buddhism/gohonzon.htm>

V. SGI's Other Arguments in Support of its Motion are Either Legally Incorrect or Irrelevant to the Issues Before the Board

Because SGI has no legal or factual basis for its motion to dismiss, it attempts to confuse the issue with citations to constitutional and federal statutory law. These arguments are either wrong on the merits or irrelevant to the limited zoning issue currently before the Board.

A. SGI's Constitutional Arguments are Unavailing

Incredibly, SGI claims that the ZA "was prohibited by both the Constitution and federal law from questioning SGI's assertion that the Project is a church."²⁸ In support of this assertion, SGI relies primarily on *Congregation Kol Ami v. Abington Twp.*, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. Aug 17, 2004) and *W. Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994).

SGI's treatment of the *Congregation Kol Ami* case underscores how badly SGI misunderstands the issues posed by FBM's appeal.²⁹ SGI cites this case for the proposition that an adjudicator should defer to the plaintiff's assertion when determining *whether a specific religious exercise is central to a plaintiff's belief system*.³⁰ However, no one is here questioning whether a specific religious exercise is central to SGI's belief system. The ZA did not make any determination about whether a specific religious exercise was central to SGI's belief system. The only issue before him (and now before

²⁸ Motion to Dismiss at 12.

²⁹ Indeed, in the court in *Congregation Kol Ami* held that requiring plaintiffs to seek a variance to build a religious institution in a district zoned for residential use posed no statutory or constitutional problems, specifically noting that the "fact that the Plaintiffs are forced to locate in non-residential areas of the Township does not significantly curtail their ability to express adherence to their faith, nor does it deny the Plaintiffs a reasonable opportunity to worship." *Congregation Kol Ami*, 2004 U.S. Dist. LEXIS 16397 at 65.

³⁰ *Congregation Kol Ami*, at n.2

the Board) was whether the primary purpose of the building at 3417 Massachusetts Ave. is as a church or place of worship.

The court in *Congregation Kol Ami* further recognized that there is a difference between zoning restrictions that prevent a religious institution from conducting its affairs in a particular manner at an already existing facility and zoning restrictions that determine where religious buildings that have not yet been built can be built. *Congregation Kol Ami*, 2004 U.S. Dist. LEXIS 16397 at 20 n.4. FBM does not dispute that once a determination has been made that the primary use of a structure is for worship, other, ancillary, uses may be made.

W. Presbyterian, wrongly relied upon by SGI, also supports FBM's position. Contrary to the facts here, the church in *W. Presbyterian* had already been built and was validly operating in a residential neighborhood. The conflict arose when the church wanted to operate a soup kitchen as part of its religious mission. The court distinguished the issue from the situation here, where the challenge is not to religious functions of a church, but involves whether the proposed building is a church at all:

*Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct.*³¹

The court in *W. Presbyterian* made no determination concerning when an applicant enjoyed matter-of-right status to build a proposed facility. But the court clearly presumed that the city can permit or exclude churches from particular localities. If the city can permit or exclude churches, it must have some mechanism for determining what is a church and what is not; otherwise the rule would be meaningless and any entity that

³¹ *W. Presbyterian Church*, 862 F. Supp. at 546 (emphasis added).

cloaked itself in the mantle of religion could build whatever structures it wanted in whatever neighborhood it wanted. In DC, the critical issue is whether the building will be used primarily for worship rather than other (religious or secular) activities.

Accordingly, *W. Presbyterian* provides no support for SGI's assertion that the ZA was not permitted to determine whether the primary use of the culture center would be for worship and, for that purpose, which religious activities constitute worship.

Additional cases cited by SGI provide no more support for its position but do further support FBM's position. SGI cites *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53 (Ill. App. Ct. 1998) for the proposition that the denial of a building permit can unconstitutionally burden the free exercise of religion when it interferes with a religious group's ability to establish a house of worship.³² This argument ignores the ultimate holding of the case: the court upheld a city zoning ordinance that restricted construction of religious buildings to certain districts in the city, and found the trial court erred in finding that the city improperly denied a special use permit application.³³

SGI cites *Alpine Christian Fellowship v. County Commissioners of Pitkin County*, 870 F. Supp. 991 (D. Colo. 1994) for the same proposition. Again, SGI entirely misses the point of FBM's initial complaint and this appeal. As the *Alpine Christian* court specifically noted, the case was not about "the construction of a building to be used as a church; it is a restriction on the activities taking place within a church building

³² Motion to Dismiss at 16

³³ Additionally, the dispute in *City of Chicago Heights* was a legal dispute over whether a church could be excluded from certain zoning districts. Here, the dispute is a factual dispute over whether the proposed building will be a church or house of worship. FBM does not dispute that churches are allowed to be built as a matter of right in this zoning district.

legitimately placed in a residential neighborhood.”³⁴ Invoking this case demonstrates that SGI is continuing to conflate restrictions on religious expression – not at issue here – with restrictions on placing certain types of buildings in certain zoning districts.

B. SGI's Federal Statutory Arguments Are Likewise Irrelevant and Incorrect

Similar to SGI's constitutional arguments, its citation to the Religious Freedom Restoration Act (“RFRA”),³⁵ which supposedly precludes a ruling in favor of FBM, is incorrect and irrelevant.

RFRA was passed to restore the compelling interest test and to guarantee its application in all cases where free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b)(1). As discussed above, this is not a free exercise case. FBM does not challenge the ability of SGI members to freely practice their religion.³⁶ FBM's only challenge, and the only issue before the Board, is whether the proposed structure is a church or other place of worship and therefore entitled to be built in an R-1 district as a matter of right.

Even if the Board were to find that this is a free exercise case, SGI would still have no case under RFRA. Under RFRA, SGI would have the initial burden of proving that the policy in question substantially burdens the free exercise of their religion. *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000). SGI has offered no proof at all, much less met this burden. Moreover, it is well settled, under both RFRA and the Constitution, that it is not a substantial burden to the free exercise of religion for a

³⁴ 870 F. Supp. at 994.

³⁵ The Supreme Court declared RFRA to be unconstitutional as applied to the States in *city of Boerne v. Flores*, 521 U.S. 507 (1997). Nevertheless, the statute still applies to the federal government and the District of Columbia.

³⁶ Thus SGI's citations to *W. Presbyterian* and *Hernandez v. Commission*, 490 U.S. 680 (1989) are unpersuasive, as both those cases dealt with a regulator questioning “the centrality of particular beliefs or practices to a faith.” *Hernandez*, 490 U.S. at 690. This issue is currently not before the Board.

municipality to regulate where religiously-affiliated buildings are built. *See Congregation Kol Ami*, 2004 U.S. Dist. LEXIS 16397 at 16-20.³⁷ As the *Congregation Kol Ami* court noted, “the First Amendment does not guarantee a perfect fit between available land and proposed religious purposes.” 2004 U.S. Dist. LEXIS 16397 at 22.

Thus, contrary to SGI’s incorrect assertion that “denying the SGI Decisions would have restricted SGI’s ability to exercise its religion,” Motion to Dismiss at 18, federal case law clearly holds that an incidental or aesthetic burden to religion is not a violation of either RFRA or the Constitution. SGI has not even met its burden of pleading under RFRA, and there would be no federal statutory or Constitutional problem with the BZA ruling that the proposed community center is not a “church or other place of worship.”

The Board should ignore SGI’s irrelevant Constitutional and RFRA arguments and decide the narrow question before it: whether the proposed assembly hall is a church or other place of worship. SGI has not made any persuasive argument that the Constitution or federal statutes prevent the Board from correctly ruling on this issue.

VI. SGI’s Legal Position Poses a Threat to the Matter of Right Privilege

If the Board were to follow SGI’s reasoning regarding who gets to determine the primary purpose of a building, it would throw the zoning system into disarray. The Board would also open itself to possible constitutional challenges because it would be conferring a benefit on religious organizations – the right to build in R-1 zones without review by any higher authority – that would not be granted to other similarly situated secular organizations.

³⁷ Citing cases holding: burden based merely on location not substantial; restricting church from building in residential area not a substantial burden; denial of special use permit not substantial burden; requiring church to seek semi-public use status not substantial burden; parking space requirement not substantial burden

A. Adopting SGI's Reasoning Would Create Disarray in the Zoning Process

SGI's arguments regarding the alleged legal inability of the ZA and the BZA to review applications to build a church or place of worship in an R-1 district are incorrect and irrelevant to the issues presented by this appeal. The Board should also understand that adopting the theories underlying SGI's position would seriously undermine the "matter of right" privilege and threaten the entire system of zoning in the District of Columbia.

SGI asserts that its own characterization as to whether its proposed building is really a church or place of worship is final and unreviewable. If this were truly the case, any group (including, as this case demonstrates, a *lay* group) that wrapped itself in the mantle of religion would be able to build a place of assembly in whatever zoning district it wanted, and there would be no order to the zoning process. Zoning regulators would be powerless to examine applicants' assertions – applicants would, in effect, be able to create a "fifth leg" on a dog.

Indeed, under SGI's reasoning, lay citizens claiming to be adherents to the "Church of Marijuana" could build "chapels" wherever they wanted, and the ZA and BZA would be powerless to stop them, or even to inquire into their "religious" practices. Such a world would quickly become "the first refuge of scoundrels"; people could "justify illegal conduct simply by crying 'religion.'"³⁸

³⁸ *U.S. v. Meyers*, 906 F. Supp. 1494, 1498 (D. Wyo. 1995).

B. Adopting SGI's Reasoning Would Benefit Religion in a Manner Inconsistent With the Establishment Clause

Currently, specific types of religious buildings – churches and places of worship – enjoy a special benefit not afforded to religious buildings generally, or to secular buildings. Namely, they can be built in districts zoned R-1. If the BZA were to extend this benefit to all religious buildings, it would be a violation of the Establishment Clause as an impermissible government benefit to religion.

A brief example will suffice to illustrate the issue here. One of the three basic guidelines³⁹ of SGI is

to join efforts for world peace, for instance, with those of the United Nations by supporting the spirit of its charter thereby helping achieve the organization's ultimate goal of the abolition of nuclear arms and universal renouncement of war.⁴⁰

Undoubtedly this is a noble goal. Indeed, it is a goal shared by a number of other organizations. If, however, an organization such as International-ANSWER were to seek authorization to build on the same location a structure dedicated to "helping achieve the organization's ultimate goal of the abolition of nuclear arms and the universal renouncement of war," its request would have to be denied. The structure would clearly not meet any of the special exemptions in § 201.1.

Under SGI's reasoning, however, if the Catholic Church wanted to build that exact same structure,⁴¹ dedicated to the exact same purpose as International-ANSWER's proposed building, not only would authorization be granted, but any effort by the ZA to

³⁹ The other two tenets are "to work for the prosperity of society by being good citizens who respect the culture, customs and laws of each country" and "to promote humanistic culture and education based on the fundamental, humane principles of Buddhism."

⁴⁰ Per their website, <http://sgi-usa.org/thesgiusa/aboutsgi/aboutsgi.html>.

⁴¹ For the record, and contrary to SGI's baseless and offensive suggestions, FBM would be just as opposed to a Judeo-Christian cultural center as it is to a Buddhist, or any other, cultural center. FBM's disagreement lies not with the beliefs of the people using the center but the purposes of use.

examine the claim of matter-of-right status would be unconstitutional. Thus, under SGI's understanding of the law, religious groups would be given a significant benefit that is not conferred on lay groups that espouse the exact same beliefs. This would be a clear violation of the Establishment Clause, which prohibits both state endorsement of one religion over another and state endorsement of religion generally.⁴² Adopting SGI's reasoning would lead the Board to favor religious purposes over non-religious purposes, and would therefore constitute an endorsement of religion generally.

Instructive here is *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), where the Supreme Court struck down as a violation of the Establishment Clause a state statute that exempted religious publications from sales and use tax. The Court distinguished the narrow tax benefit, only applicable to religious publications, from a broader tax benefit that extended to "a large number of nonreligious organizations that ostensibly served an expressly articulated secular objective that religious groups could reasonably be thought to advance as well."⁴³

The *Texas Monthly* court also specifically rejected Texas' argument that the tax exemption was necessary to avoid Establishment Clause and Free Exercise violations. Specifically, the "routine and factual inquiries" common to tax enforcement does not "pose an intolerable risk of government entanglement with religion."⁴⁴ Thus, there is no Establishment Clause problem with the ZA undertaking a "routine and factual inquiry" into the proposed uses of a structure. There would, however, be a clear Establishment

⁴² See, *Gillette v. United States*, 401 U.S. 437, 450 (1971). See also, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989), and cases cited therein.

⁴³ 489 U.S. at 14 n.5

⁴⁴ 489 U.S. at 21, quoting *Tony & Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 305 (1985).

Clause violation if the Board adopted SGI's reasoning and allowed all organizations that claimed religious affiliation to avoid scrutiny under the zoning regulations.

VII. SGI's Effort to Bolster an Untenable Legal Position Through Allegations of Religious Prejudice is Unsubstantiated and Wrong

There is no basis for SGI's assertions that FBM's appeal is motivated by xenophobic or discriminatory intent. These assertions are merely a sad effort to obscure the fact that SGI has no legal basis for its motion to dismiss.

As noted at the beginning of this response, FBM deplores SGI's unfounded but repeated *ad hominem* assertions regarding FBM's motivation in filing this appeal. There is no concern on FBM's part about religion, Buddhism, or SGI. FBM merely wants regulators to enforce the law that keeps assembly halls not dedicated primarily to worship from being built in residential neighborhoods as a matter of right.

VIII. Conclusion

Before the Board is a very narrow zoning dispute regarding whether a building proposed by SGI qualifies as a church or other place of worship under the DC Municipal Regulations. The Board should not be distracted by SGI's attempts to inject irrelevant Constitutional and federal statutory issues into this proceeding.

FBM has clearly alleged incorrect decisions of law and fact, and has therefore met its burden of pleading under the DC Code. For that reason alone, the Board should deny SGI's motion to dismiss. Additionally FBM has demonstrated that the constitutional and federal statutory arguments raised by SGI are incorrect and irrelevant, and would create utter disarray in the zoning process if they were adopted by the Board.

Accordingly the Board should deny Intervenor's motion to dismiss.